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IN THE

Supreme Court of the United States

October Term, 1971

No. 70-220

MORTIMER M. CAPLIN, Trustee in Reorganization of WEBB & KNAPP, INC., on behalf of debentureholders under a trust indenture of Webb & Knapp, Inc. to The Marine Midland Trust Company of New York, trustee, dated as of June 1, 1954,

Petitioner,

against

THE MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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I

Respondent's brief in opposition relies heavily upon the argument that there is no need to grant standing to the petitioner to assert claims on behalf of debentureholders, as the owners of the securities are willing and able to litigate their own claims. To prove the proposition, respondent points to three unidentified actions commenced by holders of Webb & Knapp, Inc. debentures "based upon the very same facts" as those alleged by petitioner (Brief in Opposition, p. 4.

Unquestionably individual debentureholders themselves have standing to prosecute their own claims, but that is beside the point. There are many situations where numerous

persons have standing to sue, and do so. However, petitioner clearly is in a better position to prosecute effectively the claims of *all* the debentureholders than are the individual debentureholders themselves. Rather than discuss the merits of the propposition, respondent attempts to brush it aside by characterizing it as "hypothetical" (Brief in Opposition 5, 6). The issue is far from hypothetical, as evidenced by this very case.

The matter which cries for the decision of this Court relates to the *power* of a reorganization trustee. This question cannot be determined on the peculiar facts, or nuances of state law relating to representative actions, involved in any particular case. Thus respondent's recital of three pending actions brought by Webb & Knapp debentureholders is not significant. But because respondent stresses those actions in its brief, without describing them, the Court should be apprised of a few pertinent details.

One action, as respondent states, is an action by a debentureholder suing in his individual capacity. Not being a class action, it will benefit no one but the individual plaintiff, if he is successful.

Another action is *Ray* v. *Marine Midland Grace Trust Co.*, New York Supreme Court, New York County, Index No. 2159-1967. As stated in the Petition at page 5, note 3, an appeal is pending in that case on the question of whether, under New York law, a class action will lie on the facts pleaded. As the index number indicates, it was commenced in 1967, but it is still in the pleading stages without final resolution of its status as a class action.

The third case is *Lewis* v. *Marine Midland Grace Trust Co.*, U. S. Dist. Ct., S.D.N.Y., Docket No. 68 Civ. 1764. Although one count of the amended complaint in that action is indeed based on the same facts as the instant case, the claim is pleaded on a very different theory: it seeks relief under section 10(b) of the Securities Exchange Act of 1934

and Rule 10b-5 promulgated thereunder, 17 CFR § 240.10b-5: Whether a Rule 10b-5 action can be maintained is open to question, as indicated by the fact, not mentioned by respondent, that a motion (in which respondent is one of the moving parties) to dismiss the complaint is pending. Even if the complaint is upheld, there will remain open the question as to whether all, or merely some, of the debentureholders will benefit from any judgment which might ultimately be recovered. Pre-trial depositions and discovery have not yet commenced in that action which is now more than three years old.

Thus the three actions which respondent say demonstrate that there is no policy served by permitting petitioner to have standing, in reality establish exactly the opposite.

The issue, however, is not whether one or three or ten actions have been commenced by debentureholders, or whether such actions are adequate to protect the rights of the entire class. The instant case and the Webb & Knapp reorganization proceedings arose in New York, where it is most likely that aggrieved debentureholders will act, with the aid of an aggressive bar, to protect their own interests. But many reorganization proceedings are administered in parts of the country where security holders and counsel may be less knowledgable. The question to be decided must be considered in terms of Chapter X reorganizations in general—not simply on the basis of the Webb & Knapp proceeding.

These policy considerations, which we believe respondent has incorrectly analyzed, undoubtedly merit attention. They are not, however, the only, or even the most important factors. Petitioner's contention is that a reorganization Trustee has standing in any event. Regardless of any other procedures available to the debentureholders, a reorganization Trustee has the power, granted by the Chandler Act, to assert their claims against an indenture trustee.

II

Respondent also notes that the issue presented here has been considered by Courts of Appeal only four times since the enactment of the Trust Indenture Act of 1939. This is no indication that the question is unimportant. It is as likely that reorganization trustees have been deterred from instituting actions against indenture trustees by the restrictive doctrine of *Clarke* v. *Chase National Bank*, 137 F. 2d 797 (2d Cir. 1943). The absence of reported opinions of Courts of Appeal does not mean that the issue arises only rarely. As the Petition shows, at pages 4-5, the question of reorganization trustees' standing arises with substantial frequency.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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